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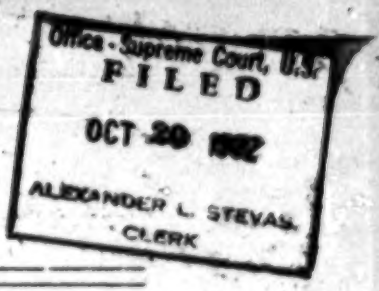

No._____

OCTOBER TERM 1982

CLYDE MARION MELLIES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

ROGER S. HANSON, ESQ.
518 South Broadway
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Pursuant to Rule 21, U.S. Supreme Court, Petitioner asserts:

A. Questions Presented foı Certiorari:

1. Whether appellant was denied the effective assistance of counsel, within the meaning of Cuyler v. Sullivan, 446 U.S. 335, 110 S.Ct. 1708, 64 L.Ed. 2d 333, by an inherent conflict of interest developed by the government calling at trial a key and critical witness also then being represented by petitioner's trial attorney, thus disenabling petitioner's trial counsel from impeachment by information gleaned in the attorney-client confidence, and where the government had wilfully concealed from the defense their plans to call this witness, thus disenabling petitioner from seeking other trial defense counsel?

2. Whether the government wilfully suppressed evidence favorable to petitioner at the grand jury which indicted petitioner and whether the sanction must be dismissal of the resulting indictment.

3. Whether the grand jury which indicted petitioner was composed of the minimal number to constitute a quorum, and whether the record in a Federal Indictment must so affirmatively demonstrate?

4. Whether a Federal trial judge can wilfully refuse to hold an evidentiary hearing where petitioner seeks to show prejudice resulting from pre-indictment delay and rule, sua sponte, insufficient time to constitute pre-indictment delay regardless of the government's reason or prejudice to petitioner, within the meaning of United States v. Marion, 404 U.S. 307, and United States v. Locasco, 431 U.S. 783?

5. Whether petitioner suffered actual prejudice and the government failed to present sufficient valid reason for the pre-indictment delay?

6. Whether a Federal Judge found to be disqualified or sucessfully challenged, can personally pick his successor or whether the

extant system of selecting the judge by lot must be used?

7. Whether it was error to deny petitioner to impeach a key government witness convicted of inherent dishonesty at the misdemeanor level?

B. Parties Below, U.S. 9th Circuit, and U.S. District Court, Central District of California:

The parties at trial, on appeal, and on this Petition for Certiorari remain the same:

1. United States of America
2. Clyde Marion Mellies

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CLYDE MARION MELLIES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner CLYDE MARION MELLIES seeks

certiorari to the United States Court of Appeals, for the Ninth Circuit to review a Judgment of that Court entered June 22, 1982, and from which a Petition for Rehearing/Suggestion for Hearing En Banc was denied August 20, 1982.

Respectfully submitted,

ROGER S. HANSON, ESQ.
Member of the Bar
United States Supreme Court

and

ROBERT D. RENTZER, ESQ.
Attorneys for Petitioner
CLYDE MARION MELLIES

D. Official/Unofficial Report of Decision Below:

The decision of the U.S. 9th Circuit affirming petitioner CLYDE MARION MELLIES conviction is unreported and was issued/filed June 22, 1982. It is attached as Exhibit "A" to this petition.

The Order Denying a Rehearing and/or Hearing En Banc was issued/filed August 20, 1982 and is attached as Exhibit "B" to this petition.

E. Grounds for Jurisdiction:

The jurisdiction of the Federal Courts in this case follows from an indictment brought against petitioner under 21 U.S.C. 841(a)(1) and 21 U.S.C. 843(b) in the United States District Court, Central District of California. Jurisdiction in this Court follows from 28 U.S.C. 1254(1).

F. Constitutional Provisions and United Statutes Involved.

AMENDMENT V

CAPITAL CRIMES;

DOUBLE JEOPARDY;

SELF-INCRIMINATION;

DUE PROCESS;

JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of publid danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

ADMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense

G. Concise Statement of the Case:

Petitioner Clyde Marion Mellies was indicted on 5 separate counts of alleged violations of 21 U.S.C. 841 (a)(1), distribution of rather minor quantities of cocaine, a schedule II narcotic drug controlled substance and one count of 21 U.S.C. 843(b), use of the telephone in the commission of a narcotic felony. The 5 separate violations of 21 U.S.C. 841(a)(1) allegedly occurred on or about January 17, 1980, February 8, 1980, March 7, 1980, April 10, 1980 and May 7, 1980, and the 21 U.S.C. 843(b) violation allegedly occurred on or about April 10, 1980. All occurred within the Central District of California.

Petitioner was not charged by complaint until February 10, 1981 and was formally indicted on February 27, 1981, about a year after this alleged activity occurred.

Petitioner was tried by Jury in the Court of the Honorable David W. Williams, U.S. District Judge, and was convicted of all

charges save the alleged violations of 21 U.S.C. 841(a)(1) occurring on January 17, 1980.

Essentially the case against petitioner was formulated by the government as follows:

1. On February 8, 1980, one Robert Jackson, acting as an informant for the D.E.A. was sent into petitioner's cabinet shop where he successfully purchased one ounce of cocaine for $2300.

2. This act was repeated on May, 7, 1980 and on April 10, 1980, for different monetary amounts, and, of course, different amounts of controlled substance. The latter time was preceded by a recorded telephonic conversation between Jackson and Petitioner, allegedly made to "see if petitioner was ready for the transaction"; the recording was played to the jury.

3. A final transaction on May 7, 1980 occurred in a motel room rented by the government; this motel room contained remotely controlled audio visual equipment which

recorded and memorialized the transaction.

4. Petitioner defended the charges by asserting that he, Mellies, allowed Robert Jackson to personally "stash" his cocaine in the cabinet shop in turn for Jackson supplying petitioner small quantities of cocaine for his personal use. Petitioner denied selling cocaine to Jackson. The visits to petitioner's cabinet shop were merely to retrieve the "stash" and the phone call was merely to see if petitioner was then available to allow Jackson access to his secret "stash" situs.

5. Petitioner explained the May 7, 1980 motel rendezvous as his accommodating Jackson's request to bring a package to the motel room and feign ownership, as the other party to the transaction allegedly mistrusted Jackson.

In actuality the purchaser was a D.E.A. undercover agent. While petitioner departed the motel with funds from the motel transaction, petitioner asserted

that Jackson met him later and recovered the entire sum collected by petitioner in his feigned role in the sale.

6. While petitioner was under investigation his former secretary, Darlene Green, became of interest to the government for alleged participation and aiding petitioner in the sales; as a consequence, Ms. Green consulted attorney Robert D. Rentzer, petitioner's trial attorney. Green admitted giving small packages of "unknown content" to various individuals at the behest of petitioner. Attorney Rentzer had thus consulted with Darlene Green in an attorney-client capacity and was bound to not reveal anything she told him. Secretly, however, the government planned to, and did call Darlene Green as a government witness. Green now radically changed her story before the jury, asserting that not only did petitioner direct her in the transferrals, but she did so knowing what the contents were. Petitioner's counsel was thus thrust into a gross conflict of interest as

to the key government witness Darlene Green and could not impeach his client with information obtained in the attorney-client atmosphere; as a consequence, petitioner was denied the highly significant impeaching evidence previously given by Green to trial defense counsel that she, Green, did not know the contents of the packets. This constitutes a deprivation of effective assistance of counsel in that it creates a gross conflict of interest in petitioner's trial defense counsel and is automatically reversible within the meaning of Cuyler v. Sullivan, 466 U.S. 335, 100 S. Ct. 1709, 64 L.Ed. 2d 333. The government suppressed Green's name as a prospective government witness from the list of trial witnesses disenabling petitioner from seeking other counsel to avoid this gross conflict of interests. The testimony of Darlene Green, was, of course, highly material and relevant, and was referred to as "devastating" by the government in the closing argument by the Assistant United States Attorney.

7. The government delayed its indictment of petitioner until almost a year had passed since the last alleged activity had occurred on May 7, 1980. However, it tried unsuccessfully to indict petitioner in October, 1980, that grand jury rejecting the case and returning a No Bill; petitioner's second grand jury had concealed from it the favorable fact and evidence that the first grand jury had failed to indict.

As a result of the lengthy delay, petitioner lost a key defense witness, Bill Slinky, who passed away in January, 1981. Slinky was a percipient witness to Jackson's admission that he, Jackson, had "set up" petitioner and had lied about petitioner's involvement to enable Robert Jackson to continue to receive government funds to entrap petitioner. A second witness, Joe Fars, dies in December, 1980. Fars was a percipient witness, and knowledgeable about the true reasons for petitioner frequenting a location which the government inferred was a "stash pad". The government created delay in the

indictment for nearly a year thus prejudiced petitioner within the meaning of United States v. Marion, 404 U.S. 307 (1971) and United States v. Locasco, 431 U.S. 783. The delay was impermissible.

The trial court denied an evidentiary hearing looking into the extensive pre-indictment delay.

8. While key government witness Robert Jackson was impeached by prior felony convictions, his attempted impeachment of the inherently dishonest misdemeanor conviction by wilfully making a false statement on a license application to the Federal Government was denied by the trial court. This is demonstrated error under 28 U.S.C. 609(a).

9. An issue of first impression is presented in Federal District Court procedure: when the initial trial judge is selected by lot, and is subsequently disqualified for cause, may the successor judge be selected and hand-picked by the very judge then disqualified, or must the successor judge be selected again by Lot.

H. The basis for Federal Jurisdiction at the trial level and on appeal therefrom was petitioner's Federal Grand Jury indictment and trial for violations of 21 U.S.C. 841 (a) (1) and 21 U.S.C. 843 (b). Jurisdiction in this Honorable Court follows from 28 U.S.C. 1254(1).

ARGUMENT I

AN ACTUAL CONFLICT OF INTEREST EXISTED, AS DEVELOPED AT TRIAL BY THE GOVERNMENT'S CHOICE OF WITNESSES, BETWEEN DEFENSE COUNSEL'S REPRESENTATION OF PETITIONER AND HIS SIMULTANEOUS REPRESENATION OF KEY GOVERNMENT WITNESS DARLENE GREEN, WITHIN THE MEANING OF CUYLER V. SULLIVAN, 466 U.S. 335, 100 S.CT. 1709, 64 L.Ed.2d 333; THE U.S. 9TH CIRCUIT FAILED TO APPLY THE PROPER TEST AND THIS HONORABLE COURT MUST GRANT CERTIORARI AND REMAND TO THE U.S. 9TH CIRCUIT AND THENCE TO THE DISTRICT COURT FOR EVALUATION WHETHER PETITIONER'S TRIAL ATTORNEY REFRAINED FROM A MORE VIGOROUS CROSS-EXAMINATION OF HIS CLIENT, DARLENE GREEN, CALLED AS A GOVERNMENT WITNESS BECAUSE OF THE ACTUAL CONFLICT AND DIVIDED LOYALTIES, AND, IF SO,

WHETHER PETITIONER'S REPRESENTATION WOULD HAVE BENEFITTED EVEN MARGINALLY FROM A MORE AGRESSIVE CROSS-EXAMINATION.

Petitioner Mellies operated a cabinet making shop in the Los Angeles area where he employed one Darlene Green as his secretary. When petitioner was investigated for supplying small quantities of cocaine, the government developed evidence that petitioner had asked Darlene to act as an intermediary to transfer small quantities of undisclosed internal identity to various persons entering the shop. Because petitioner was represented by attorney Robert Rentzer preceding his arrest, and because of government interest in Darlene, Ms. Green consulted attorney Rentzer, telling him that indeed she had transferred the small packages not knowing their contents. Unbeknown to petitioner and Mr. Rentzer, the government secretly planned to call and did call Darlene Green as a key government rebuttal

witness. During the direct testimony, Darlene radically altered her story told under the client-attorney relationship that she had established with Mr. Rentzer, testifying before the jury that she had acted at petitioner's behest and had been aware of the contents of the packets. Obviously it then became necessary for trial defense counsel Rentzer to impeach Darlene Green with the previously supplied statements that she did not know what she was doing for petitioner. Yet trial defense counsel Rentzer then was serving two clients and could not effectively and thoroughly cross-examine Green with statements made to Rentzer by Green within the attorney-client privilege and thus destroy her very damaging and key rebuttal testimony against petitioner. Petitioner thus was totally devoid of the assistance of his retained trial counsel because of the actual conflict of interest created by attorney Rentzer representing both petitioner at his trial in the Court room, and the key government

witness Darlene Green.

The test is demanding to the government and there is no need to show "prejudice" if a true conflict of interest is demonstrated on the part of the trial defense attorney in attempting to represent both the defendant on trial and a key government witness!! The government's production of highly incriminating nature cannot save the conviction.

The test, as stated in Cuyler, supra, is whether the conflict of interest affected the trial performance of petitioner's attorney and this evaluation depends solely on this inquiry, unaffected by a horde of other evidence. See Brown v. United States, No. 81-3006, decided January 7, 1982, ___ F.2d. ____ (9th Cir. 1982).

Certiorari should be granted to further explicate the demands of Cuyler v. Sullivan, 466 U.S. 335.

ARGUMENT II

PETITIONER MELLIES WAS THE SUBJECT OF INVESTIGATION WHICH WHEN THE VOTE TO INDICT OCCURRED ON OCTOBER 12, 1980, THE INITIAL GRAND JURY FAILED TO INDICT; A SECOND GRAND JURY WAS LATER CONVENED WHERE THE RECORD DOES NOT DEMONSTRATE THE PRESENCE OF THE MINIMAL NUMBER OF GRAND JURORS BEING PRESENT DURING THE BULK OF THE TESTIMONY, AND WHERE THE GOVERNMENT CONCEALED THE FAVORABLE EVIDENCE THAT THE PREVIOUS GRAND JURY HAD FOUND INSUFFICIENT EVIDENCE TO INDICT. THE WILFULL SUPPRESSION OF THIS FAVORABLE EVIDENCE BEFORE THE SECOND GRAND JURY, WHEN THE MINIMAL QUORUM WAS NOT DEMONSTRATED TO BE PRESENT, VIOLATES THE MANDATES OF MOONEY V. HOLOHAN, 294 U.S. 103; PYLE V. KANSAS, 317 U.S. 213; UNITED STATES V. MESAROSH, 352 U.S. 1; ALCORTA V.

TEXAS, 355 U.S. 28; NAPUE V. ILLINOIS, 360 U.S. 264, 269; BRADY V. MARYLAND, 373 U.S. 83, 87; MILLER V. PATE, 386 U.S. 1; GIGLIO V. UNITED STATES, 405 U.S. 150; DeMARCO V. UNITED STATES, 415 U.S. 449 AND UNITED STATES V. AGURS, 427 U.S. 97; LEADING STATE SUPREME COURT DECISIONS HOLD THAT A GRAND JURY CONSIDERING A RENEWED ATTEMPT TO INDICT MUST BE INFORMED, BY WAY OF OVERT EVIDENCE PRESENTED, OF THE FAILURE TO INDICT BY A PREVIOUS TRIBUNAL/TRIER OF FACT: JOHNSON V. SUPERIOR COURT, (1975), 15 CAL. 3rd 248, 124 CAL. RPTR. 32, 539 P. 2d 972; SEE ALSO UNITED STATES V. BASURTO, 497 F.2d 758, (9th CIR. 1974). UNDER EITHER THE FEDERAL DUE PROCESS CLAUSE OF THE 5TH AMENDMENT, OR UNDER THE SUPERVISORY POWERS OF THIS HONORABLE COURT OVER THE LOWER FEDERAL COURTS, THIS CONVICTION MUST BE SET ASIDE;

CERTIORARI SHOULD THEREFORE BE GRANTED.

Petitioner was charged with five violations of an identical Federal statute, 21 U.S.C. 841 (a)(1), proscribing the distribution of the controlled substance cocaine on the dates of January 17, 1980; February 8, 1980; March 7, 1980; April 10, 1980 and May 7, 1980. On April 10, 1980, a concomitant alleged violation of 21 U.S.C. 843(b) occurred. It is important that all six of these counts occurred well before October 21, 1980 when the entire scenario was first placed before a grand jury convened in the Central District of California in Los Angeles. This grand jury failed to return an indictment, a result concealed from petitioner and his counsel until May 4, 1981, a day before petitioner's instant trial commenced. Petitioner had been indicted in the interim by a second grand jury convened to receive the identical evidence presented to the first grand jury, and, moreover, the government wilfully concealed and suppressed from the

second grand jury the key, substantial and favorable evidence that the identical evidence placed before a previous grand jury had failed to produce an indictment. Generally said, the concealment of evidence favorable to a criminal defendant, either federal or state, constitutes a denial of Federal Due Process of Law under the 5th and 14th Amendments. Mesarosh v. United States, 352 U.S. 1 provides that this Honorable Court can rectify denials of key rights to Federally tried defendants under its superviosry role over the lower Federal Courts. However, and as well, the suppression of evidence favorable to a Federal (or state) defendant rises to a deprivation of Due Process of Law; Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Alcorta v. Texas, 355 U.S. 28; Napue v. Illinois, 360 U.S. 264, 269; Brady v. Maryland, 373 U.S. 83, 87; Miller v. Pate, 386 U.S. 1; Giglio v. United States, 405 U.S. 150; DeMarco v. United States, 415 U.S. 449; and United States v.

Linda Agurs, 427 U.S. 97.

The leading State Supreme Court of California has ruled that concealment of dismissal of the charges at a previously held preliminary hearing from a subsequently convened grand jury deprives a state criminal defendant Due Process of Law: Johnson v. Superior Court (1975) 15 Cal. 3rd, 248, 124 Cal. Rptr. 32, 539 P.2d 792; see also United States v. Basurto, 497 F.2d 758 (9th Cir. 1974). Moreover, petitioner's grand jury received the great bulk of its evidence at a session where the record fails to disclose the presence of a minimum quorum; although a subsequently taken vote at a brief later session reveals the requisite basic number of grand jurors, grand jury regularity cannot be presumed from a silent record. Boykin v. Alabama, 395 U.S. 238 (1969).

In view of the above demonstrated duality of grand jury indictment insufficiencies, certiorari should be granted under either

the aegis of this Honorable Court's supervisory role over the lower Federal Court system, or under the 5th Amendment Due Process Clause.

It should be noted the preceding argument may, infact, be predicated on a false premise in that the government has offered an unconvincing and convoluted explanation concerning the multiple Grand Jury proceedings which, if accepted without question, might serve to negate this issue.

ARGUMENT III

APPELLANT'S RIGHT OF DUE PROCESS REQUIRES DISMISSAL OF INDICTMENT BY REASON OF GOVERNMENT DELAY.

The Government unjustifiably delayed in initiating prosecution of this case predicated upon an indictment which occurred on February 27, 1981, alleging violations of the law in May of 1980 (Count I), April, 1980 (Counts II and VI), March, 1980 (Count III), February, 1980 (Count IV), and January, 1980 (Count V), and upon which indictment defendant was not arraigned until March 9, 1981, nor given any notice of any pending charges against him until February 12, 1981 when arraigned on a one count complaint of February 10, 1981, said complaint containing the identical accusation set forth in Count I of the subsequent multiple count indictment. As a result of this delay, appellant suffered actual prejudice to his ability to prepare his defense as hereinafter appears. Consequently, the due

process clause of the Fifth Amendment demands that this indictment be dismissed.

In United States v. Marion, 404 U.S. 307, (1971), this Honorable Court, addressing the issue of pre-indictment delay, formally recognized that the due process clause of the Fifth Amendment requires a dismissal of criminal charges under certain circumstances caused by such pre-indictment delay. Unlike post-indictment delay, the defendant must show actual prejudice caused by the pre-indictment delay. Further, the Government's reason for the delay must be an impermissible one. This Court's recent decision in the United States v. Locasco, 97 S. Ct. 2044, 431 U.S. 783, 53 L. Ed. 2d 7, clarified what had been left unclear by Marion: The defendant must show both prejudice and an impermissible reason for the delay. The court in Locasco interpreted its opinion in Marion to mean that "proof of actual prejudice makes a due process claim concrete and ripe for adjudica-

tion, not that it makes the claim automatically valid." The reason for the delay must also be considered. Id, at 4629. The reasonableness of the delay must be balanced against the prejudice suffered by the defendant. United States v. Mays, 549 F. 2d 670, United States v. Barket, 530 F. 2d 189 (8th Cir. 1976).

The decision as to whether the defendant can still obtain a fair trial in light of pre-indictment delay will necessarily involve a delicate judgment based on the circumstances of each case." United States v. Marion, supra, at 325; United States v. Locasco, supra, United States v. Mays, supra.

1. Actual Prejudice

A Due Process claim under the Fifth Amendment is properly raised when pre-indictment delay must "impair the capacity of the accused to prepare his defense." United States v. Feinberg, 383 F. 2d 60, 65 (2d Cir. 1967), United States v. Barket, supra, United States v. Jackson, 504 F. 2d 337 (8th Cir. 1974),

cert. denied, 95 S. Ct. 1356 (1975). This capacity may be impaired if the key defense witness or other evidence is lost.

> "[I]f any of these events occur, the reliability of the proceedings for the purpose of determining guilt becomes suspect."
>
> United States v. Feinberg, supra, at 66; Woody v. United States, 370 F. 2d 214 (D.C. Cir. 1966).

For example, the death before trial of a co-defendant who was an eyewitness to the crime constitutes actual prejudice. In United States v. Macino, 486 F. 2d 705 (7th Cir. 1973), this was so even where the Government argued that it was unclear whether the co-defendant would have testified in a manner helpful to the defendants. The court stated that it could not find that such testimony would not have been helpful. "Certainly the death of a witness with first-hand knowledge of the events at issue creates the strong

possibility of prejudice to a defendant." Id. at 754, United States v. Barket, supra. There, during a period of pre-indictment delay, six material witnesses linked to the events with which the defendant was charged died. The delay resulted in the dismissal of the indictment. The court concluded that the delay of twenty-eight months was "extraordinary" and the prejudice was "manifest". Id., United States v. Demasi, 445 F. 2d 251 (2d Cir. 1971), cert. denied, 404 U.S. 882 (1971).

A defendant seeking dismissal of an indictment on grounds of pre-indictment delay must show specific examples of prejudice. Failure to do so mandates denial of a due process claim. United States v. Marion, supra, United States v. Mays, supra, United States v. Foddrell, 523 F. 2d 86 (2d Cir. 1975), cert. denied, 96 S. Ct. 70 (1975), United States v. Griffin, 464 F. 2d 1352 (9th Cir. 1972) cert. denied, 409 U.S. 1009 (1972), United States v. Bray, 442 F. 2d 1064 (9th Cir. 1971). Mere specula-

tion as to prejudice is insufficient, as is only a general description of missing witnesses' usefulness to the defendant's case. United States v. Mays, supra. The defendant must show that evidence to which the lost witness would testify would be material and not tangential or of doubtful admissibility. See, United States v. Erickson, 472 F. 2d 505 (9th Cir. 1973), United States v. Anros, 484 F. 2d 521 (9th Cir. 1973), United States v. Feinberg, supra.

Prejudice due to a pre-indictment delay need not be proved beyond a reasonable doubt nor even by a preponderance of the evidence. A "plausible claim" of prejudice is sufficient. Jackson v. United States, 351 F. 2d 821, 823 (D.C. Cir. 1965) (involving a five month delay). This is because the prejudice claimed by the defendant, the failure to recall the facts at issue, impairs the ability of the defendant to prove prejudice.

Thus, most cases find that it is the de-

fendant's burden to prove in a concrete manner that witnesses lost through the Government's delay would have provided exculpatory testimony, or that such testimony would at least have been more helpful than harmful. See, e.g., United States v. Sand, 541 F. 2d 1370 (9th Cir. 1976). Contra, United States v. Barket, supra, where the court held the Government to the burden of showing that the missing witnesses did not possess exculpatory evidence.

However, all courts realize the difficult task to which the defendant is thus put. A defendant without knowledge that criminal charges are to be filed does not seek to record the statements of others who might have knowledge of the circumstances surrounding the alleged offense. If those witnesses die before trial, the defendant may be unable to meet the test set out by the courts simply because the witnesses are no longer available to tell the defendant the substance of their potential testimony. United States v. Mays, supra,

Woody v. United States, supra.

In the case at bar, testimony and motions demonstrated that two material witnesses that could have testified to crucial elements of the defendant defense had died. The first witness, BILL SLINKY, died in January, 1981. (Before defendant was indicted, but well after the dates of defendant's alleged misconduct.) He was an ex-bartender of the Red Lantern, a restaurant which MR. MELLIES, the petitioner, testified he frequented often. (R.T., p. 237, l. 10-12.) MELLIES claimed that MR. SLINKY, if alive, would have testified concerning the May 7, 1980 transaction. MELLIES claimed that SLINKY admitted that the informant confided in him (SLINKY), that he ROBERT JACKSON, had set CLYDE up to make some money from the government. According to MELLIES the decedent informed MELLIES of that fact in December, 1980, just prior to his death. He further informed the defendant, MELLIES, that ROBERT JACKSON acknowledged that defendant MELLIES was an

innocent dupe in ROBERT JACKSON's scheme. (R.T., p. 235-236). For want of there being any prosecution against the defendant MELLIES before SLINKY's death, nor any advisement of MELLIES being the target of an investigation, his information could not be legally preserved nor was there any necessity to attempt to do so. However, this individual could have completely exonerated the defendant and completely inculpated ROBERT JACKSON were he alive to do so.

(Note: The Government's case turned on the credibility of JACKSON, who, even on the very evening following his testimony in a related case (United States v. Ezell Blunt and Alphonse Jones, case number CR80-934 TJH)went out on a "frolic of his own" and unknowingly sold contraband to an agent, as subsequently disclosed by the Government, but ruled inadmissible by the trial court). (R.T., p. 95-97).

Additionally, the trial court erred in refusing to allow petitioner to testify as

to MR. SLINKY so informing him, such testimony being offered as two exceptions to the hearsay rule, i.e., a declaration against penal interest, (R.T., p. 236, l. 17-18), and also admissible to impeach ROBERT JACKSON, the informant in the case, (R.T. p. 276, l. 11-17), who alleged he never met MR. SLINKY and denied the conversation with him. Thus, petitioner was unable in any manner to utilize the information acquired by the decedent, and was gravely prejudiced thereby.

Additionally, a second material witness died in December, 1980, prior to petitioner being informed of these proceedings. This was a MR. JOE FARS, who rented office space in the complex housing the answering service which petitioner was depicted going to and coming from preceding the violations set forth in the various counts, implying the location was some type of "stash pad". Said decedent could have testified to the innocent nature of these seemingly clandestine trips to and from

the answering service premises since said deceased observed petitioner to be working on construction plans at the answering service location on varying dates including the dates in question, as well as on numerous other occasions.

Because of the loss of these two witnesses, petitioner was compelled to take the witness stand to explain conduct which otherwise could have been explained through other witnesses, thus abrogating petitioner's privilege not to testify, which privilege he was forced to waive. Furthermore, even if the petitioner is deemed to have voluntarily waived his privilege not to take the stand, the death of these two essential witnesses deprived petitioner of the opportunity to offer independent corroborating testimony of MELLIES' innocence and the total unreliability of the informant.

Even though the petitioner here is able to meet the burden required by the majority in Mays, Judge Ely in dissent in Mays found that

the better test is,

> "not . . . whether independent evidence demonstrates that the missing witness intended to exculpate the defendant and how, but rather whether the witness had a material basis upon which to provide significant exculpatory information. . . [The trial court must evaluate whether or not lost] witnesses were critical participants in the transactions upon which the . . . [charges] were based. If these witnesses were critical participants, then, indubitably, they had a firm basis upon which to provide information material to the adequate reconstruction of the events leading to the belated indictment; thus, the unavailability of their testimony would unfairly impair the ability of the defendants to

defend against the charges."

United States v. Mays, supra at 275-276, [footnote omitted] (Ely, J. dissenting).

For all of these reasons, MR. MELLIES was able to show considerable actual prejudice to his defense. Assuming that the Government's reason for delay is an impermissible one, the indictment must be dismissed and the case reversed.

2. The Reason For the Delay

The Ninth Circuit has found that when the defendant has established actual prejudice, it is the Government's burden to provide the court with the reason for the delay. United States v. Mays, supra.

Although several courts have required the defendant to show a delay caused by governmental bad faith, see, e.g. United States v. Cordova, 537 F. 2d 1073 (9th Cir. 1976), United States v. Foddrell, supra, United States v. Ricketson, 498 F. 2d 397 (7th Cir.) cert.denied, 95 S. Ct. 27 (1974), United

States v. Andros, supra, United States v. Griffin, supra, not all courts have found bad faith to be essential. See, e.g., Ross v. United States, supra. The court there found that a delay of seven months between the alleged commission of the offense and the issuance of the complaint was at least partially caused by budgetary limitations on the police department. Further, if the police department were motivated to delay by its interest in protecting the public, such motivation must be balanced against the defendant's right to a fair trial. Since the delay was "purposeful", Id. at 215 (through not bad faith), the court dismissed the indictment. The Ninth Circuit adopted the Ross doctrine in Estrella v. United States, 429 F. 2d 400 (9th Cir. 1970), cert. denied. 400 U.S. 1001 (1971).

The Ninth Circuit has recently noted that the "bad faith doctrine" was "actually [part of the] . . . as such it may not represent the bottom line for dismissals based on

pre-indictment delays." United States v. Mays, supra, at 267.

The court in fact found that "negligent conduct can also be considered, since the ultimate responsibility for such circumstances must rest with the Government rather than the defendant. Id. at 269 [citations omitted].

Indeed, this Honorable Court in its recent opinion of United States v. Locasco, supra, found that the delay there was a result of the Government's continuing investigation. It was not a delay taken solely to gain a tactical advantage over the defendants. (But, see, Jackson v. United States, supra, where the delay of five months was "the clear responsibility of the Government and was arranged solely for its advantage. . ." 351 F. 2d at 823. The delay, according to the Government, was caused by its policy of continuing undercover investigations as long as they were effective. The Court found that this delay was not motivated as well by a desire to

accomodate fairness and efficiency. United States v. Jackson, supra, involved an eleven month delay between the alleged selling of heroin and the return of the indictment. "Even a legitimate excuse of a continuing undercover investigation may be stressed to the breaking point; at some point, the accused's right to due process of law must prevail." 504 F. 2d at 340 [footnote omitted].)

The Government in Locasco contended that the investigation of the offense did not end with the report issued after the first month, even though in the seventeen months following the postal inspectors' initial interview with the defendant, little additional information was uncovered. The court found that the Government delayed indictment to investigate further and that such delay did not violate those "'fundamental conceptions of justice which lie at the base of our civil and political institutions'. . . and which define "the community's sense of fair play and de-

cency.'"" Thus, it is proper for prosecutors to delay filing charges until they are satisfied that they will be able to prove the charges beyond a reasonable doubt. Further, it is proper for the Government to delay until all possible defendants in the case can be arrested, thereby preventing multiple trials involving a single offense. Finally, it is proper for prosecutors to delay until deciding whether it is just to indict. "In our view, investigative delay is fundamentally unlike delay taken by the Government solely 'to gain tactical advantage over the accused.'" Id., at 4630, quoting from United States v. Marion, supra.

Thus, this Honorable Court in Locasco has not determined the bottom line in defining what constitutes an insufficient reason for governmental delay in prosecuting a case. While this court makes clear that a valid investigative delay is a sufficient reason for delay (see, also, United States v. Bray, supra), it also noted the Government's concession that

reckless conduct by the Government might be enough to merit dismissal.

The Supreme Court did not reach this question because no evidence of recklessness was shown. Thus, it is unclear what other circumstances are improper, short of delay, to gain a tactical advantage over the defendant. Obviously, however, this Honorable Court did not intend to limit the second prong of the test to a showing of a delay based solely upon the desire to gain a tactical advantage over the defendant.

In this light, it is helpful to examine the circumstances under which lower courts have found impermissible reasons for delay. In United States v. Mays, supra, defendants were indicted for offenses occurring between March and November of 1969. Various investigations and reports by bank examiners were made through November of 1969. In November of 1969, the examiners advised the F.B.I. of possible fraudulent action. In December of 1969, the examiners notified the United States Attorney's

office. In April of 1970, the United States Attorney's office declined to prosecute the case. Between July, 1970 and March, 1973, the United States Attorney's office did not actively pursue the matter aside from three meetings held to discuss the case. The F.B.I. during this same time conducted only a brief series of interviews with prospective witnesses which lasted approximately two months. Between January 23, 1970, and July 10, 1972, the Controller's Office spent no time on the investigation. In 1972, twenty-five hours were spent and in 1973, 473 hours. In March of 1973, a more active role in the case was taken by the United States Attorney's Office. In December of 1973, the case was presented to a Grand Jury and indictments were turned on May 6, 1974.

The court found that the delay was not an intentional one and that the District Court's finding of intent was clearly erroneous. But the delay was "clearly negligent". Id. at 270. Thus, it reversed and remanded for the

lower court to again evaluate the defendant's claim. Cf. United States v. Macino, supra, where defendants were convicted of counterfeiting. They claimed that a twenty-eight month delay between the date of arrest and the return of indictments violated their Sixth Amendment right to a speedy trial. The court, relying on Barker v. Wingo, 407 U.S. 514 (1972), found that a deliberate attempt to delay a trial in order to hamper the defense weighs heavily against the Government. Governmental negligence, overcrowded courts, or an understaffed prosecutor's office, should be weighed less heavily against the Government, but must be considered, since the ultimate responsibility for such a delay rests with the Government, and not the defendant. (See, also, United States v. Mays, supra, at 273, [Ely, J. dissenting], United States v. Barker, supra.) Justifiable delay would be caused by, for example, an attempt to find a missing Government witness. See, also, Stuart v. Craven, supra, (unexplained

administrative delays in the District Attorney's Office and prosecutorial negligence), United States v. Simmons, 536 F. 2d 827 (9th Cir. 1976) cert. denied, 429 U.S. 854 (1977) United States v. Lara, 520 F. 2d 460 (D.C. Cir. 1975), United States v. Washington, 504 F. 2d 346 (8th Cir. 1974). In United States v. Barket, supra, the Court found that negligence renders a delay unreasonable. Its inadvertence does not reduce the impact upon the defendant, but rather "adds an additional factor favoring [the defendant] in the Fifth Amendment balance." Id. at 195 [citations omitted]. The court found the Government's culpability sufficient to require dismissal. Cf. Barket v. Wingo,407 U.S. 514 (1972).

In the case at bar, the pretrial motion for dismissal due to pre-indictment delay and the affidavits attached thereto reflected that:

1. The Drug Enforcement Administration suboenaed telephone records of the petitioner on or about February 25, 1980 and April 25,

1980, in response to which the defendant requested an explanation under the Freedom of Information Act, which response was acknowledged but which request for explanation remained unanswered to date of trial.

2. The United States Attorney subpoenaed bank records of the defendant on or about October 30, 1980, in response to which the defendant's attorney called the office of the United States Attorney and spoke with Daniel Gonzalez inquiring as to whether the defendant was the "target of an investigation", but Deputy United States Attorney Daniel Gonzalez refused to reveal this information.

In the case at bar, the Government had no reason to conceal its investigation of MR. MELLIES and no reason for failing to apprise him of his having been the subject of a grand jury proceeding from and after the date upon which he communicated directly with the United States Attorney in response to the suhpoenaing of his bank records. Should the

Government contend that such an advisement would have impeded the investigation by alerting the defendant, this contention would be patently spurious in that the notification by the telephone company of the Drug Enforcement Administration having subpoenaed records clearly alerted defendant upon receipt of said notification in October, 1980. Furthermore, the notification of defendant by his bank likewise alerted defendant.

Should the Government contend that notifying the defendant in timely fashion, i.e., October , 1980, would have exposed the informant and rendered him valueless in an ongoing investigation of MR. MELLIES, this contention would likewise be spurious in that said informant was both exposed and revealed upon the Government instituting prosecution against Ezell Blunt and Alphonse Jones on or about October, 1980, at the earliest, or on or about November, 1980, at the latest, when the informant was identified in the Blunt-Jones

case on the record in compliance with a discovery motion. (The Government had been advised on the record, in the Blunt and Jones case, that counsel for Blunt and Jones was also counsel for MELLIES.) Furthermore, the reports of the Government's own agents in the Blunt and Jones matter unequivocally stated that MELLIES had ceased any and all narcotic activity in August, 1980, and that Blunt had been substituted for MELLIES in this regard. This even more graphically demonstrates that nothing was to be accomplished in terms of further inculpating MELLIES by deferring any advisement or delaying process against MELLIES.

It should be noted that MELLIES resided at the same address known to the Government from the inception of its investigation to the time of his belated arrest and maintained the same business address during this period. It should also be noted that MELLIES was not arrested until after BLUNT had agreed to plead guilty and until after the JONES trial

had concluded with an acquittal of MR. JONES. It is thus suggested that the delay in the arrest of MELLIES was to gain a tactical advantage over him by causing either BLUNT or JONES or both of them to cooperate with the Government and inculpate MELLIES to gain consideration at the time of their sentencing, there being no other logical reason for the delay.

The only other possible basis for the delay was to allow time for repayment of a $10,000.00 debt owed by defendant, MELLIES, to the government's rebuttal witness, DARLENE GREEN, which payment she would have clearly been unable to secure once testifying against the defendant. Such a possible reason for the delay, as suggested during trial, would clearly require dismissal of the tardy proceedings. (R.T., p. 428, l. 14-24).

However, the only reason the government could actually offer for delay was the cliche that the investigation was. "ongoing", and an earlier arrest of the defendant would have

jeopardized the investigation. This statement, however, was refuted by defense counsel's reference to the May, 1980 notification of defendant's phone records being subpoenaed as well as the October-November, 1980 arrest of alleged co-conspirators wherein the facts of the investigation as well as the identity of the informant were revealed to counsel for defendant. Finally, even at the time of the Grand Jury presentation, as reflected on page 15 of the Grand Jury Transcript, lines 12 through 21, (Please refer to the Grand Jury Transcript incorporated herein by this reference), this delay was so obviously questionable as to cause a grand juror to ask the question, "Why would you leave him out there almost a year before trying to indict?" To this the case agent merely replied that he was seeking to "remove the complete organization". When asked relative to the higher ups, "did you get him?" the case agent responded, "we are still working on it", which reply

graphically demonstrates that the investigation could and in fact did proceed after the arrest of the defendant, hence there was no justifiable reason to have delayed said arrest for nine months as to Count I, ten months as to Count II and VI, eleven months as to Count III, twelve months as to Count IV and thirteen months as to Count V.

Should any doubt remain in the Court's mind concerning the alleged necessity for delaying the MELLIES arrest so as to facilitate the on-going investigation as claimed by the prosecution, one need only resort to the discovery materials furnished defense counsel wherein it is unequivocally stated that, "on August 11, 1980 Source" (informant: formerly confidential, subsequently revealed October, 1980)" stated that CLYDE MARION MELLIES indicated to him that he would not be directly involved in any new drug sales inasmuch as he(MELLIES) had been identified to an unmentioned local police department as being a cocaine supplier. This

information, likewise, was reiterated and affirmed in full detail by the prosecution in the trial of Alphonse Jones in December, 1980.

Due to the foregoing, appellant's due process rights were violated and the case must be reversed since defense counsel had repeatedly protested the prejudicial delay.

The United States Supreme Court in Locasco, left to the District Courts the task of determining which particular circumstances merit the dismissal of an indictment on the grounds of pre-indictment delay. It is submitted this is such a case in that the defense here has shown:

1. Actual prejudice, in the loss of several witnesses;

2. A purposeful, unnecessary, negligent, even reckless delay on the part of the Government from between nine to thirteen months which resulted in the actual prejudice sustained by petitioner MELLIES as seen in defense counsel's affidavit and exhibits lodged in support of the original motion to dismiss.

ADDITIONALLY, AND PERHAPS EVEN MORE IMPORTANTLY, the trial judge wrongfully denied defendant's minimal request for, at the very least, an evidentiary hearing regarding pre-indictment prejudicial delay which delay was, from the most recent count, nine months (May, 1980 to arraignment of February, 1981), and from the most ancient count, thirteen months (January, 1980 to arraignment of February,1981). This the court did following oral argument by arbitrarily stating that the delay was not of sufficient length to warrant an evidentiary hearing. Such hasty and expedient conduct lacked all the attributes of an informed judicial decision and flew in the face of authorities holding that even a five month delay warranted dismissal (authorities cited supra).

Certiorari should thus be granted to explicate more lucidly the criteria for dismissal of Federal charges due to impermissible governmental pre-indictment delay.

ARGUMENT IV

THE TRIAL JUDGE ERRED IN SELECTING A NEW JUDGE BY DESIGNATION RATHER THAN LOT, RESULTING IN A DENIAL OF EQUAL PROTECTION.

On May 4, 1981, the Honorable A. ANDREW HAUK, after receiving a motion requesting that he recuse himself, selected the Honorable DAVID W. WILLIAMS to hear defendant's trial. Defendant questioned the manner in which the selection was made, contending that a new judge should be selected by lot. The denial of said request resulted in a conviction without equal protection, as it was the very judge who was alleged to be prejudiced who had selected the new trial judge.

No points and authorities are submitted as no law could be found in this regard and this appears to be an issue of first impression.

ARGUMENT V

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO INQUIRE IN LIMITED SCOPE INTO A MISDEMEANOR CONVICTION OF THE INFORMANT.

Defense counsel sought to impeach ROBERT JACKSON regarding his misdemeanor conviction for making a false statement on a license application to the Government. (R.T.,, p. 73, l. 3-7). The court, in determining that said violation was a misdemeanor, refused to allow defense counsel to inquire for impeachment purposes into this matter. It is the defense contention that the court should have allowed the defense to inquire into this highly relevant area, as the informant's lack of credibility was the essence of the defense.

Title 28, United States Code, Section 609 (a) provides as follows:

> "General Rule. The purpose of attacking the credibility of a witness. Evidence that he has

been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) is punishable by death or imprisonment in excess of one year under the law in which he was convicted, and the court determined that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant; (2) involved dishonesty or false statement, regardless of the punishment." 28, United States Code, Section 609(a).

Pursuant to the foregoing, this was a permissible area for cross-examination and such argument to the jury would have further impeached the informant's credibility. Since the entire case relied upon the informant's credibility this issue became highly relevant

and the error was harmful.

The error was found to be present by the U.S. 9th Circuit which ruled that it was harmless. In view of the fact that the entire case turned on the credibility of Robert Jackson, more particular evidence that Jackson made a practice of lying to the government was corroborating, and impeaching evidence was crucial, and its wrongful exclusion far from harmless.

ARGUMENT VI

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO PROVE, IN LIMITED SCOPE, THAT THE INFORMANT SOLD NARCOTICS TO AN AGENT THE VERY EVENING FOLLOWING HIS TESTIMONY IN A RELATED FEDERAL PROSECUTION.

Defense counsel advised the trial court (R.T., p. 95-97) that during an earlier trial in a related matter, the said informant immediately following his testimony, engaged in a narcotics transaction wherein he sold contraband to an agent while "on a frolic of his own". The government had disclosed this fact to defense counsel and when this issue was presented in the MELLIES' trial the government reaffirmed this occurrence stating that the informant was that very day to be arraigned in state court for this illegal conduct.

Since the essence of MELLIES' defense was that this informant, "BUDDY", sold contraband,

which was his own, seeking to cloak himself with government protection, and since the informant's sale to an agent clearly corroborated defendant's contention of the informant's modus operandi, this testimony should have been allowed. . .especially in view of the death of SLINKY, the only other independent witness of the informant's deceitful conduct toward the government.

The refusal to allow this key evidence via sworn witness constitutes a denial of 6th Amendment compulsory power to secure witnesses for defense of petitioner.

CONCLUSIONS

For each and every one of the foregoing issues, authorities and argument, this Petition for Certiorari should be granted.

Dated: October 12, 1982

Respectfully submitted,

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and

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